2. Can a violation of the Federal Boiler Inspection Act be predicated only on a violation of an order of the Interstate Commerce Commission?

3. Do the orders of the Interstate Commerce Commission, requiring a part or appurtenance—such as a rear headlight—to be provided and maintained in good condition on a locomotive, exempt the carrier from violation of the Federal Boiler Inspection Act when such part or appurtenance is in bad order and by reason thereof causes or contributes to an injury to its interstate employee, except when the injury is suffered at the precise time and under the exact circumstances and in connection with the momentary particular use to which the locomotive is then being put, contemplated by a narrow and strict interpretation of the language of the Interstate Commerce Commission orders?

4. Is a rear headlight permanently affixed to the rear of a tender of a locomotive, a part and an appurtenance of the locomotive within the purview and command of the Federal Boiler Inspection Act itself, and required thereby to be in proper condition and safe to operate in the service to which the same is put without unnecessary peril to life or limb, irrespective of any order which the Interstate Commerce Commission has promulgated on the subject?

5. Does the Boiler Inspection Act require only that a locomotive and its parts be in such condition that no additional perils be "created", or does it require that they be in such condition that all unnecessary perils be avoided?

6. When a cause is tried to a jury on the uncontested theory and premise that the coal car was equipped with an inefficient hand brake which, although set, permitted it to

drift from a safe place to a place fouling the main track, and substantially undisputed evidence to that effect is admitted expressly without objection, is the Appellate Court authorized to reverse a jury's verdict upon the ground that it was error to allow full damages if the jury found that the hand brake on the coal car was inefficient and permitted it to drift from a safe to an unsafe place and thereby contributed to cause the injuries?

7. Can the right to a trial by jury, and to a jury's proper determination, of the issues of fact with respect to violation by the carrier of the Federal Safety Statutes, and the desirable uniformity in the determination and enforcement of federally created rights under such statutes in conformity with the federal decisional law, be denied and thwarted in the state courts, by the limitations, restrictions and technicalities of the local law and the rules of court relating to and regulating practice and procedure governing appeals and other forms of review?

8. Has the relator been denied the right to trial by jury, and to the jury's proper determination, of the issues in the subject action?

IV.

Summary Statement of Matters Involved.

Relator brought an action (R. 3-6) in the Superior Court of Cook County, Illinois against The New York, Chicago & St. Louis Railroad Company; duly demanded a trial by jury (R. 6, 8) and recovered judgment (R. 8-10) entered on the jury's verdict for $40,000 for personal injuries under the Federal Employers' Liability Act (45 U.S.C. Sec. 51 *et seq.*), the Federal Safety Appliance Act (45 U.S.C. Sec. 11) and the Federal Boiler Inspection Act (45 U.S.C. Sec. 23).

The railroad company admits its liability under the Federal Employers' Liability Act (R. 11, 28).

Relator, a brakeman employed by the railroad company as a member of a crew of an interstate freight train, was riding on the stirrup on the southwest corner of the tender of a locomotive as it backed west on the main track in defendant's dark, unlit Fort Wayne Railroad Yard at about ten minutes before midnight on November 14, 1946. The light on the rear of the tender was out of focus, throwing its rays up instead of down toward the track, according to the testimony of the plaintiff and according to the opinion of the Appellate Court,

> "an issue of fact to be determined by the jury was created if this alleged defect in the light can be made the basis of an action under the Boiler Inspection Act".

A spur track came off the main track at an angle to the south and west. When close to the junction of the spur track, petitioner saw a coal car on the spur track admittedly too close to and fouling the main track. Petitioner attempted to get around the corner of the tender, but before he could do so he was caught by the coal car and sustained injuries for which he brought suit. (R. 11-15, 28)

The jury was instructed that under the Federal Boiler Inspection Act it is the defendant's duty to furnish a locomotive, its boiler, tender and all parts and appurtenances thereof in proper condition and safe to operate in the service to which the same are put and that may be employed in active service without unnecessary peril to life or limb, and that if the jury should find from the greater weight of the evidence that the defendant failed to equip its locomotive and tender with an efficient and properly focused light and that to equip such locomotive and tender with such a light caused, or proximately con-

tributed to cause, unnecessary peril to life or limb of the plaintiff and made the locomotive unsafe to operate in the service to which the locomotive and tender were put, it might then find that the defendant had violated the Federal Boiler Inspection Act and that, if it should further find that the furnishing of such a locomotive and tender with a light that was dim and out of focus directly and proximately caused injuries to be sustained by the plaintiff, then, even though the jury might find from the greater weight or the preponderance of the evidence that the plaintiff was guilty of contributory negligence, the Federal Boiler Inspection Act denies to the defendant and deprives the defendant of the defense of contributory negligence on the part of the plaintiff, and such contributory negligence, if any, would not act as a bar or diminish the right of the plaintiff to recover full damages for such injuries, if any, he has sustained. (R. 17-18)

The Appellate Court held that the giving of this instruction constituted reversible error because,

> "Defendant being under no obligation under the Boiler Inspection Act to provide a light on the rear of the tender, is not liable under that act if a light installed but, not required by the act, was not properly focused. No claim can be made that the projection of the rays of this light into the air created an 'unnecessary peril to life or limb' in the operation of the engine."

The basis of this ruling was that neither of the orders of the Interstate Commerce Commission specifically relating to rear lights, namely Rule 129 or Rule 131, required any rear light at the precise time at which, and under the particular circumstances under which, relator was injured, namely when a road engine was backing to couple on to its train. (R. 13-14).

At the trial of the action the railroad company did not contest its liability under the Federal Safety Appliance Act. In opening the defendant's case to the court and jury, defendant's counsel, admitting that the coal car was too close to the main track, stated:

> "Now I notice what Mr. Fuerst said about how the car got there. I don't know if it was put there, or whether it had drifted there. In other words, if the brakes were defective in holding the car."

It offered no evidence to contradict the testimony of the relator that on going to work around 9:15 to 9:30 P.M., he saw the coal car on the spur track about ten feet from the switch and a regular yard brakeman was setting the brake on it (R. 11-13), and the further testimony of plaintiff (R. 42-45) that when brakes are set on cars and they are functioning efficiently, they hold the cars in place where they are braked, and if they are not functioning efficiently, the car will drift on a slope. Relator further testified, expressly without objection which was withdrawn after it had been sustained, (R. 43-44) as follows:

> "Q. What would you say, from the point where the brake was applied, where you saw it applied where this car was in the clear, to where the car was when you started to work with your engine and your body came in contact with that car, whether that brake was efficient?
>
> "Mr. Moir: I object to that, if your Honor please.
>
> "The Court: Objection sustained.
>
> "Mr. Fuerst: May I respectfully—
>
> "Mr. Moir: Just a minute, if your Honor please. I withdraw the objection. Proceed.
>
> "The Court: All right.
>
> "Mr. Moir: Have the question read.
>
> (Question read.)
>
> "A. No, I would say it wasn't.

"Mr. Fuerst: Q. When brakes are set on cars and they are working efficiently do they permit the cars to drift?

"A. No, sir."

The trial court charged the jury that under the Federal Safety Appliance Act it was the defendant's duty to provide safe and efficient hand brakes on all cars used or hauled on its railroad, and that if the jury found from the greater weight of the evidence that defendant failed to equip the cars on the spur track with efficient hand brakes, that the omission to have efficient hand brakes on such cars directly and proximately caused the cars to drift or move from the position they had originally occupied when the brakes were set to a place where they would foul the O.P. Main track, and that such failure or omission directly and proximately caused injuries to be sustained by the plaintiff, then, even though the jury found from the greater weight of the evidence that plaintiff was guilty of contributory negligence, the Federal Safety Appliance Act denies to the defendant, and deprives the defendant, of the defense of contributory negligence on the part of the plaintiff, and such contributory negligence, if any, will not act as a bar to plaintiff's right to recover full damages for such injuries, if any, he has sustained. (R. 18-19)

The Appellate Court held that the proceedings and evidence referred to and the other evidence in the record did not warrant the giving of that instruction (R. 12-13, 14), and thereby invaded the province of the jury, and for all time, has denied, disregarded, and deprived the relator of his inherent and guaranteed statutory and constitutional rights to the jury's proper determination thereof, under the Safety Appliance Act and the decisions of this Court.

V.

REASONS FOR ALLOWANCE OF WRIT.

1. The decision of the Appellate Court which the Supreme Court of Illinois has refused to review, denudes the Federal Boiler Inspection Act of its primary, positive and clear command, and substitutes therefor rules of the Interstate Commerce Commission too narrowly construed, and is capricious, arbitrary and void and contrary to the provisions of the act and to the controlling federal decisional law. Federal Boiler Inspection Act, 45 U.S.C. Sec. 23; I.C.C. Rules 101, 129, 131, C.F.R. Title 49, Parts 1-91, Secs. 91.1 pp. 1236; *Tiller* v. *Atlantic Coast Line Railroad,* 32[illegible] U.S. 574; *Southern Ry. Co.* v. *Lunsford,* 297 U.S. 39[illegible] *Lilly* v. *Grand Trunk Western Railroad Co.,* 317 U.S. 481; *Louisville & N. R. Co.* v. *Botts,* 173 F. (2d) 164; *Bolan* v. *Lehigh Valley R. Co.,* 167 F. (2d) 939; *Hines* v. *Smith,* 275 Fed. 766.

2. The right to a trial by jury and to the jury's proper determination of the issues with respect to violation of the provisions of the Federal Boiler Inspection Act and the causal connection of such violation with the injuries sustained by the relator has been finally and irrevocably denied the relator by the decisions of the Appellate Court of Illinois and of the Supreme Court of Illinois in violation of the relator's right to such jury trial under the provisions of the 7th amendment of the Constitution of the United States, and relator has been denied equal protection of the laws contrary to the provisions of the 14th amendment of the Constitution of the United States and to the Federal Decisional Law governing and controlling the determination and enforcement of the relator's federally created rights. *Wilkerson* v. *McCarthy,* 336 U.S. 53; *Bailey* v. *Central Vermont Ry.,* 319 U.S. 350; *Brady* v. *Southern Ry.*

Co., 320 U.S. 476; *Urie* v. *Thompson*, 337 U. S. 163; *Brown* v. *Western Railway of Alabama*, 338 U. S. 294.

3. The decisions of the State court of Illinois in this cause violate the rule of desirable and essential uniformity in the adjudication of federally created rights and decide federal questions contrary to the applicable and controlling federal decisions. *Brown* v. *Western Railway of Alabama*, 338 U. S. 294; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476.

4. The public at large, as well as all railroad employees and common carriers by railroad engaged in interstate commerce, will be irreparably injured and damaged, and their rights destroyed, and endless abortive litigation will be engendered, if the opinion of the Appellate Court of Illinois for the First District, which the Supreme Court of Illinois has refused to review, be permitted to stand. The opinion of the Appellate Court has been ordered to be published in full under Rule 36 of that court, providing for the publication of only such decisions "as contain a discussion of a new or doubtful question of law, or involve the application of rules of law to a novel state of facts, or decide a new or unsettled question of practice" and will be cited and considered as authority for the non-liability of a carrier which permits a rear headlight or any other part or appurtenance of a locomotive to be out of order and ineffective unless an order of the Interstate Commerce Commission requires the safety device to be in good order at the particular time and for the particular use to which the locomotive is then being put. Rule 36 of the Appellate Court of Illinois for the First District; *Woods* v. *New York, Chicago & St. L. R. Co.*, 339 Ill. App. 132, 88 N.E. (2d) 740; *Fairport P. & E. R. Co.* v. *Meredith*, 292 U. S. 589.

5. The opinion of the Appellate Court, which the Supreme Court of Illinois has refused to review, with respect to the violation of the Federal Safety Appliance Act is

contrary to the controlling federal decisions with respect to the sufficiency of evidence in order to make an issue of fact for a jury determination and is contrary to the law of the State of Illinois and to the fair administration of justice in any jurisdiction with respect to trial of a cause involving uncontested issues. *Affolder* v. *New York, C. & St. L. R. Co.*, No. 200, Oct. Term 1949, decided March 13, 1950, 70 S. Ct. 509; *Lavender* v. *Kurn*, 327 U.S. 645; *Myers* v. *Reading Co.*, 331 U. S. 477; *Cusson* v. *Canadian Pacific Ry. Co.*, 115 F. (2) 430; *Eker* v. *Pettibone*, 110 F. (2) 451; *Spotts* v. *Baltimore & Ohio R. Co.*, 102 F. (2) 160; *Anderson* v. *Baltimore & O. R. Co.*, 89 F. (2) 629, certiorari denied 302 U.S. 696; *Didinger* v. *Pacific R. Co.*, 39 F. (2) 798; *Pennsylvania R.R. Co.* v. *Auchenbach*, 16 F. (2) 550; *Brown* v. *Western Railway of Alabama*, 338 U.S. 294; *Williams* v. *New York Central R. Co.*, 402 Ill. 494; *Oscanyan* v. *Arms Co.*, 103 U.S. 261; *Anderson* v. *Chesapeake & O. R. Co.*, 352 Ill. 561; *Allen* v. *United States Fidelity & Guaranty Co.*, 269 Ill. 234; *Peterson* v. *General Rug & Carpet Cleaners*, 333 Ill. App. 47; *Kluska* v. *City of Chicago*, 97 Ill. App. 665.

PRAYER.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue out of this court directed to the Supreme Court of the State of Illinois, commanding said court to certify and send to this court the record of the proceedings in the above entitled cause, being cause No. 31427 in said court, including also the record and proceedings in cause No. 31428 entitled, *William Edward Woods, Plaintiff-in-Error* v. *The New York, Chicago & St. Louis Railroad Company, Defendant-in-Error*, and cause No. 31429, entitled, *William Edward Woods, Petitioner* v. *The New*

York, Chicago & St. Louis Railroad Company, a corporation, Respondent, to the end that said causes may be reviewed and that the proceedings therein be determined by this court as of right and justice ought to be done, and that the judgment of the Appellate Court of Illinois for the First District, entered in the subject action on November 21, 1949, be expunged or reversed and the judgment of the Superior Court of Cook County, Illinois, entered in the subject action on May 7, 1948, be affirmed and reinstated.

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS, *Petitioner,*

By HARRY G. FUERST and
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77 West Washington Street
Chicago 2, Illinois

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1.

Opinion Below.

The opinion of the Appellate Court of Illinois is officially reported in *Woods* v. *New York, Chicago & St. Louis R. Co.,* 339 Ill App. 132. It is also reported in 88 N. E. (2d) 740.

The Supreme Court of Illinois has delivered no opinion. Its order denying petitioner's motion for leave to file an original petition for writ of mandamus is contained in the record, pp. 96-97, fol. 36, and its order denying petitioner's motion for reconsideration of said order is contained in the record, pp. 102-103, fol. 43.

2.

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are:

1. Under Section 1651 of Title 28 of the United States Code, and in the exercise of the inherent jurisdiction of this Court to issue all common law writs necessary and appropriate in aid of its jurisdiction agreeable to the uses and principles of law, this Court has jurisdiction to determine, by such writ as may be needful to that end, the federal questions involved in the relator's claim of federally created rights and the federal questions herein arising under the Federal Employers' Liability Act (45 U. S. C. Secs. 51 *et seq.*) and the Federal Safety Appliance Act (45 U. S. C. Sec. 11) and the Federal Boiler Inspection Act (45 U. S. C. Sec. 23) and to preserve and

restore to the relator his right to a trial by jury and to the jury's proper determination of the issues arising under the Federal Safety Statutes, as guaranteed to him by the Constitution of the United States and of the State of Illinois, and as provided as a part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act, and to enforce the rule announced by this court that uniformity in the adjudication of the federally created rights under the federal statutes involved herein is desirable and essential, whether the enforcement of such rights be sought in the state or federal courts. U. S. Constitution, Art. III, §§1, 2; 28 U. S. C. §1651; *Brown* v. *Western Railway of Alabama,* 338 U. S. 294; *Urie* v. *Thompson,* 337 U. S. 163; *United States Alkali Export Ass'n.* v. *United States,* 325 U. S. 196; *House* v. *Mayo,* 324 U. S. 42; *Ex Parte Republic of Peru,* 318 U. S. 578.

2. Under Section 1257(3) Title 28 of the United States Code, this court has statutory jurisdiction to review a final orders of the Supreme Court of the State of Illinois in the original proceeding for writ of mandamus in said court, which is the highest court of the State of Illinois, and to review the federal questions involved in relator's claim of federally created rights under the federal statutes above referred to, and in accordance with the method provided thereby, and by the Constitutions of the State of Illinois and of the United States, where a trial by jury of the issues has been properly demanded. 28 U. S. C. §1257(3).

The date upon which the orders sought to be reviewed became final is January 18, 1950.

3.

Statement of the Case.

The relator is the victim of procedural difficulties which threaten to inflict irreparable damage and injury upon him in the enforcement of his federally created rights under the provisions of the Federal Employers' Liability Act (45 U. S. C. Secs. 51 *et seq.*), the Safety Appliance Act (45 U. S. C. Sec. 11) and the Federal Boiler Inspection Act (45 U. S. C. Sec. 23).

Through the admitted negligence of his employer, a railroad common carrier, serious physical injury was inflicted upon him while he was performing his duties as an interstate freight brakeman at about midnight in his employer's dark, unlit railroad yard in Fort Wayne, Indiana, on November 14, 1946. His injuries were of such a serious character that the jury awarded him damages in the sum of $40,000.00. He alleged, and the evidence concededly warranted the jury in finding, that the rear light on the locomotive tender, on the side of which he was riding in the due and proper performance of his duties as it backed west on the main track, was out of order and out of focus and cast its light up into the air instead of along the tracks, with the result that he was unable to see a coal car in such a dangerous position on a spur track that it fouled the main track and did not afford sufficient clearance for the moving locomotive and tender until it was too late for him to get to a position of safety. The coal car, according to the claim and evidence of the relator, which the railroad company and its counsel did not dispute, had drifted from a safe position on the spur track, which it occupied when a regular yard brakeman applied the hand brake on it earlier in the evening, to its dangerous position, because it was not equipped with an efficient hand brake. (R. 11-14, 28-29, 42-45)

The judgment in favor of the relator has been reversed by the Appellate Court of Illinois for the First District with an opinion erroneously holding that the relator was not entitled to have the case submitted to the jury under the provisions of the Federal Safety Statutes and remanded for further proceedings in conformity with its opinion. As will appear from the opinion, the relator has been finally and irrevocably denied the right to recover under the Federal Boiler Inspection Act, in view of the basis upon which the Appellate Court's opinion proceeded. It is apparent that no amount or character of additional evidence can materially affect the basis upon which the Appellate Court proceeded with respect to the violation of the Federal Boiler Inspection Act.

Under the local laws of the State of Illinois and the rules of court relating to and regulating practice and procedure governing appeals and other forms of review, the relator has exhausted all proper remedies in the state courts for an appropriate order or judgment reversing or expunging the judgment of the Appellate Court and affirming or reinstating the judgment of the Superior Court of Cook County without success. (R. 29)

A retrial under the Appellate Court's opinion would merely be in effect an assessment of damages to which the relator is entitled, in view of the admitted liability of the railroad company under the Federal Employers' Liability Act, giving the railroad company the benefit of possible deduction in the amount of damages on account of contributory negligence on the part of the relator. In view of the facts, even as stated in the Appellate Court's opinion, which is more favorable to the railroad company than the record warrants, (R. 28) it is difficult to conceive that any jury would find that any negligence on the part of the relator contributed to his in-

jury,—certainly not in any degree that would, or should, materially affect the amount of damages to which he is entitled.

Even under the meager statement of facts, as set forth in the Appellate Court's opinion, it is apparent that the only basis for charging the relator with contributory negligence was his failure to see the fouling coal car before he did see it, or his failure to take some other action in the emergency when he discovered that he was in danger of being crushed to death,—in other words, his failure to have been born with cat eyes which could penetrate the darkness better than he or the engineer operating the engine could do, or better judgment in a sudden emergency, namely attempting to jump off the moving tender in the darkness and risk the danger of being thrown under its wheels.

On the other hand, it is apparent even from the statement of facts contained in the Appellate Court's opinion, that the railroad company's negligence was multiple and gross. In addition to admitted liability

> "in failing to provide the plaintiff with a reasonably safe place in which to work and in failing to provide sufficient clearance between the spotted coal car and the moving engine and tender" (R. 11),

it is apparent that the engineer operating the engine was grossly, almost criminally, negligent in operating the engine if the rear light was in proper condition and sufficient to show an object as large as a man either 800 feet away, as required by I. C. C. Rule 129, or 300 feet away as required by I. C. C. Rule 131, or any reasonable distance as must necessarily have been intended when the railroad company installed the rear light on the tender, even if not required to do so by either order of the Interstate Commerce Commission. And if the rear light shone

up in the air instead of along the tracks, we submit the new jury should be permitted to find, and that any jury would find, that the railroad company was negligent in permitting the light to be in that condition, even if it did not constitute a violation of the Federal Boiler Inspection Act.

4.

Specification of Errors.

The Supreme Court of Illinois erred:

1. In denying petitioner's petition for leave to file application for writ of mandamus.

2. In refusing to issue writ of mandamus commanding the respondents to expunge the judgment entered by the First Division of the Appellate Court of Illinois for the First District, and commanding the respondents to affirm the judgment of the Superior Court of Cook County.

5.

ARGUMENT.

Summary.

The rear headlight on the tender of the locomotive was a part and an appurtenance of the locomotive and tender within the scope and command of the Federal Boiler Inspection Act itself, and required thereby to be in proper condition and safe to operate in any service to which they were put, that they might be employed in the active service of the carrier without unnecessary peril to life or limb, irrespective of any orders or rules which the Interstate Commerce Commission has promulgated. The Boiler Inspection Act itself, unaided and unrestricted by any order of the Interstate Commerce Commission, requires that all parts and appurtenances of all locomotives and tenders used on the lines of an interstate common carrier by railroad, be maintained at all times in proper condition and safe to operate in the service to which they are put without unnecessary peril to life or limb. A violation of the Act does not have to be predicated on a violation of an order of the Interstate Commerce Commission. The orders of the Interstate Commerce Commission requiring (Rule 129) certain locomotives used in road service, and (Rule 131) all locomotives used in yard service, to be equipped with rear headlights, maintained in good condition, affording sufficient illumination to enable a person in the cab to see an object as large as an average sized man at a distance of 800 and 300 feet respectively, do not exempt a carrier from violation of the Act, if a light is installed, even if it be not strictly required by these orders, and is permitted to be out of focus and in bad or improper condition, entailing

unnecessary peril to a person required to ride on a backing tender through an unlit railroad yard in the darkness of midnight. On the contrary, the first rule of the Interstate Commerce Commission with reference to locomotives and tenders, (Rule 101) provides that,

> "The railroad company will be held responsible for the general design, construction and maintenance of locomotives and tenders under its control."

The Act does not require only that a locomotive and all its parts be in such condition that no additional perils be "created", but it does require that they be in such condition that all unnecessary perils be avoided. It is apparent that if the rear light in question was in such condition that its beam was thrown upward into the air instead of along the tracks, so that the dangerous position of the coal car could not be seen in time to avoid the very accident that occurred, the rear light, locomotive and tender were not in proper condition and safe to operate in the service to which they were being put without unnecessary peril to the relator; that the Boiler Inspection Act was violated; and that such violation caused or contributed to relator's injuries and authorized the jury to award him full damages, without any deduction for any possible contributory negligence on his part.

The evidence as to the inefficiency of the hand brake on the coal car, apart from the opening statement of counsel for the railroad company on the trial, was amply sufficient to warrant the jury to find that the brake was not efficient and permitted the coal car to drift from the safe place it occupied when the brake was applied to the unsafe place fouling the main track and causing relator's injuries, and warranted the instruction under the Safety Appliance Act. But beyond that, in view of the opening statement of the railroad company's counsel, however the learned jus-

tices of the Appellate Court saw fit to construe it, none can gainsay that the statement is subject to the interpretation that the railroad company was not contesting its liability under the Safety Appliance Act any more than that it was not contesting its liability under the Federal Employers' Liability Act. It offered no evidence to the effect that the brake was efficient and in proper working order, or any evidence with respect to the direction of the slope of the spur track, except the testimony of the three members of the crew, which is referred to in the Appellate Court's opinion. Contrary to the statement in the opinion of the Appellate Court that

> "the drift of the coal car toward the main track was impossible under the uncontradicted evidence that the spur track sloped to the west and away from the main track",

the railroad company's reply brief (p. 7) in the Appellate Court stated:

> "Reading the cold printed testimony of defendant's three witnesses, we concede that the words used by two of them (McKinney and Thomas) may be ambiguous as to whether the Clifford siding 'sloped' *up* or 'sloped' *down* from the O.P. main. The testimony of Farr that the siding 'slopes *away from* the O.P. main' (Abst. 135) plainly connotes a downward slant away. McKinney said the track 'slopes to the west' (Abst. 123) This *could* mean either an uphill or downhill slant. Webster's New International Dictionary (2d ed.) gives as one of the definitions of the verb 'slope,' 'to have a slant,' and as one of the definitions of the noun 'slope,' 'upward or downward slant or inclination.' Thomas said the Clifford siding has 'an incline to the West' (Abst. 138). In the same dictionary we find one of the meanings of 'incline' is 'ascent or descent.'"

> "If the only things we had to go by were those few words without the aid of Farr's testimony, we confess it might be embarrassing to tell which way the slant was."

Farr's testimony that the siding "slopes away from" the main track refers to horizontal distance—and not to vertical direction.

There is an inadvertent omission from the opinion of the Appellate Court as set forth in the Petition for Mandamus (R. 13). It should read: "The conductor said the spur slopes to the west; the fireman that it slopes away from the main track, and the engineer that it is an incline to the west" *Woods* v. *New York, C. & St. L. R. Co.,* 339 Ill. App. 132.

To permit the reversal of the judgment upon the ground that it was error to permit the jury to award full damages in the event that they found violation of the Federal Safety Appliance Act contributed to cause relator's injury, would be a mockery and a travesty upon justice. The theory upon which the case was tried was that there was no contest of this issue.

These propositions are so patently and indisputably true that the conclusion is inescapable that the learned justices of the Appellate Court reached their decision and rendered their opinion arbitrarily and capriciously in such flagrant violation of the recent teaching of this Court as to indicate hostility with which some judges, as this Court is aware, view this type of litigation and the resistance they display toward the rulings, especially the recent rulings, of this Court in these railroad cases.

This case presents an ideal vehicle for this Court to implement and enforce the "uniform federal rule" which is essential to the end that "litigants under the federal act receive similar treatment in all states", and that "the desirable uniformity in adjudication of federally created rights" in all courts, state and federal, be achieved.

I.

The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Boiler Inspection Act.

The Federal Boiler Inspection Act (45 U. S. C. Sec. 23) provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The tender of the locomotive involved in the subject action was equipped by the defendant with a rear light permanently affixed to the tender and forming a permanent and integral part of it. Therefore, the rear light became and was a part and an appurtenance of the locomotive, physically in fact and in legal contemplation. *Tiller* v. *Atlantic Coast Line Railroad,* 323 U. S. 574; *Southern Ry. Co.* v. *Lunsford,* 297 U. S. 398; *Hines* v. *Smith,* 275 Fed. 766.

The opinion of the Appellate Court stated:

> "In support of his action under the Boiler Inspection Act plaintiff testified that the light on the rear of the tender was out of focus, throwing its ray up instead of down toward the track. Members of plaintiff's crew contradict this testimony, and an issue of fact to be determined by the jury was created if

this alleged defect in the light can be made the basis of an action under the Boiler Inspection Act."

However, the Appellate Court held that since the Interstate Commerce Commission rules with reference to rear or back-up lights on tenders did not require any light on the tender in question at the precise time of relator's injuries because the locomotive was then being used in road service and was within the exception stated in I.C.C. Rule 129(b), no violation of the Federal Boiler Inspection Act could be predicated on the condition of the light.

The Interstate Commerce Commission rules, and its right or authority to promulgate rules, are purely ancillary to and in aid of the Federal Boiler Inspection Act and do not supplant its positive and basic command. The Appellate Court erroneously held, however, that it was necessary for the Interstate Commerce Commission to promulgate a rule, covering the precise movement or *use* of the locomotive and the particular and exact situation at the moment of injury, before any right of recovery can be predicated on a defective appurtenance, which is out of order and not in proper condition. In other words, it held in effect, that a bad light was better than no light, and since no light was required by the rules of the I.C.C., and the bad light did not "create" an additional peril, no violation of the Boiler Inspection Act can be based on the condition of the light. Therefore, the Appellate Court erroneously deprived relator of any right to recover under the Federal Boiler Inspection Act, itself.

The Appellate Court's opinion stated:

"Defendant being under no obligation under the Boiler Inspection Act to provide a light on the rear of the tender, it is not liable under that act if a light installed, but not required by the act, was not properly focused. No claim can be made that the projection

of the rays of this light into the air created an 'unnecessary peril to life or limb' in the operation of the engine."

Petitioner submits that this ruling is clearly contrary to the provisions of the Federal Boiler Inspection Act and to all of the decisions of the United States Supreme Court bearing on the subject, to which the Illinois Supreme Court in *Williams* v. *New York Central R. Co.*, 402 Ill. 494, has recently subscribed. The ruling finds no support in any authoritative or persuasive decision of any court in the nation, state or federal.

The decision of the Appellate Court in failing to recognize the fundamental requirement of the Boiler Inspection Act has denuded this Act of its primary, positive, clear command, namely: forbidding the use of any locomotive, boiler, or tender, and any parts and appurtenances thereof, which are not in proper condition and safe to operate in the service to which they are put without unnecessary peril to life or limb. Under this statute it was the defendant's duty to provide a safe locomotive and tender and all parts and appurtenances of both, irrespective of the rules of the Interstate Commerce Commission. The rear light on the tender was a part and appurtenance of the locomotive and tender; and it was for the jury, and not for the Appellate Court, to determine whether or not unnecessary peril contributing to relator's injuries was caused or created or was not avoided by the improper condition of the light. The Appellate Court seeks to substitute the rules of the Interstate Commerce Commission for the positive command of the Boiler Inspection Act. The Boiler Inspection Act is the basic, prime and dominant command from which arises the right of recovery for any defect of any part or appurtenance of a locomotive or tender, irrespective of the minimum require-

ments under any rules promulgated by the Interstate Commerce Commission.

No ruling or regulation by the Interstate Commerce Commission is necessary to bring within the scope or command of the statute a rear light which was in fact installed by the defendant on the tender as a permanent, integral and essential part thereof, and the fact that the Interstate Commerce Commission has promulgated rules regarding rear lights does not exempt from the statute a light or any other part or safety device which is actually and in fact a part or appurtenance of a locomotive or tender.

In *Tiller* v. *Atlantic Coast Line Railroad,* 323 U. S. 574, the locomotive was ordinarily used in road service and did not have any rear light. It was pushing a string of cars which would have obscured the light if there had been one. Holding that the Trial Court was correct in permitting recovery for violation of the Boiler Inspection Act, this Court said:

> "It was for the jury to determine whether the failure to provide this required light on the rear of the locomotive proximately contributed to the deceased's death.
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> • • •
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> "Assuming, without deciding, that the railroad could consistently with Rule 131 obscure the required light on the rear of the engine, it does not follow that, as a matter of law, failure to have the light did not contribute to Tiller's death. The deceased met his death on a dark night, and the diffused rays of a strong headlight, even though directly obscured from the front, might easily have spread themselves so that one standing within three car lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found. The backward movement of cars on a dark

> night in an unlit yard was potentially perilous to those compelled to work in the yard. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 33, 64 S. Ct. 409. And 'The standard of care must be commensurate to the dangers of the business.' *Tiller* v. *Atlantic Coast Line Railroad, supra,* 318 U.S. at page 67, 63 S. Ct. at page 451, 87 L. Ed. 610, 143 A.L.R. 967."

In the subject action the backward movement of the engine was potentially perilous to the relator, who was required to ride through a dark, unlit railroad yard on the stirrup at the side of the tender with an inefficient headlight. If the headlight were properly focused, so that its rays of light shone along the ground instead of up into the sky, the relator's life and limb would not have been unnecessarily jeopardized. The position of the coal car fouling the main track would have been seen in time to avoid injury. The opinion of the Appellate Court deprives the relator for all time from any recovery under the Federal Boiler Inspection Act. To permit such a final decision to remain the law of the case at bar would be a travesty and a mockery of justice both as against your relator and as against the very purpose of the Congressional Act for the protection of railroad employees.

In *Urie* v. *Thompson,* 337 U. S. 163, an action to recover damages for silicosis, it was contended, and this Court agreed, that the Rule of the I.C.C. relating to sanders was not intended as a protection against silicosis, but was intended merely to afford additional braking power, and under the "conventional tort doctrine" would not impose absolute liability. Holding that the Boiler Inspection Act itself, irrespective of the purpose of the rule, provided the right of recovery, this Court said:

> "• • • we think the liability imposed by the Boiler Inspection Act is of broader character and that the correct rule is the one laid down in *Louisville & N. R.*

Co. v. *Layton,* 243 U. S. 617, 621, which this Court has had repeated occasion to apply in connection with the Safety Appliance Acts: 'The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,— not from the position the employee may be in, or the work which he may be doing at the moment he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever failure to obey these Safety Appliance Laws is a proximate cause of injury to them when engaged in the discharge of duty'."

Here again this Court calls attention to the fact that the Boiler Inspection Act provides the basis of the rights for recovery by railroad employees who are injured as a result of unnecessary peril arising from the use of a locomotive which a jury was warranted in finding was not in proper condition and safe to operate in the service to which it was put, even though the rule of the I.C.C. was not intended as protection against silicosis.

In *Lilly* v. *Grand Trunk Western Railroad Co.,* 317 U. S. 481, 63 S. Ct. 347, this Court, held with respect to a rule of the Interstate Commerce Commission which was not called to the attention of the trial court, namely, a rule requiring the "Top of the tender behind the fuel space be kept clean, and means provided to carry off waste water", that the presence of ice on the top of the tender involved unnecessary peril to life and limb, and that the jury was justified in finding that the presence of ice constituted a violation of the Boiler Inspection Act even in the absence of such a rule. The Court said:

"* * * Negligence is not the basis for liability under the Act. Instead it 'imposes upon the carrier an

absolute and continuing duty to maintain the locomotive and all parts and appurtenances thereof, in proper condition, and safe to operate * * * without unnecessary peril to life or limb.' (Citing cases) Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act. (Citing cases).

"The Act, like the Safety Appliance Act, 45 U. S. C. A. Sec. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. (Citing cases).

"The use of a tender, upon whose top an employee must go, which is covered with ice seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated. * * *

"Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. * * * The failure of petitioner's counsel to call Rule 153 to the attention of the trial court should no more deprive petitioner of its benefits than the failure to plead specifically the Federal Employers' Liability Act foreclosed the application of that Act on appeal to test the correctness of the trial judge's refusal to charge in *Grand Trunk Western Railroad Co.* v. *Lindsay*, 233 U. S. 42, especially when, as here, *the rule only fortifies a result the jury could probably have reached even in the absence of such a rule.*" (Emphasis ours)

In that case, although the railroad company did not place the ice on the tender nor was there any defect of any part or appurtenance causing it to be there, but it came about from the unavoidable and uncontrollable oper-

ation of the natural elements, the presence of ice, irrespective of the effect of any rule of the Interstate Commerce Commission was definitely determined to authorize the jury to find a violation of the Boiler Inspection Act.

By the same token, a headlight which is out of order, as the jury concededly was justified in finding with respect to the light in the subject action, constitutes a violation of the Boiler Inspection Act, irrespective of any rule which the Interstate Commerce Commission had made or might make.

The decisional law of this Court on all phases of the federally created rights for redress for injuries sustained by interstate railroad employees is controlling on and must be applied by all courts, state and federal. And this Court uniformly has held that when a railroad company installs, constructs and maintains on and as an integral part of a locomotive or tender any appurtenance, liability for proper maintenance of the appurtenance in an efficient manner is obligatory on the railroad company, by virtue of the provisions of the Boiler Inspection Act itself, irrespective of any order, actual or potential, of the Interstate Commerce Commission.

In *Hines* v. *Smith,* 275 Fed. 766, the Circuit Court of Appeals for the Seventh Circuit affirmed a plaintiff's judgment which depended on the applicability of the Boiler Inspection Act to the defective condition of an automatic bell ringer which was not prescribed or regulated by any rule promulgated by the Interstate Commerce Commission, saying:

> "It is claimed on behalf of the plaintiff, and evidence supports the contention, that the automatic bell ringer was out of order and would not ring on the night of the accident, and that it had been out of order for some time. In answer thereto, defendant asserts

that this act does not apply to bell ringers, and that the declaration does not charge a violation thereof. With neither position can we agree. The amendment of 1915 (extending the provisions of the Boiler Inspection Act to all parts and appurtenances of the locomotive, whereas formerly the Act had applied only to the boiler) we think, leaves no room for doubt. Certainly a bell ringer is a 'part' or an 'appurtenance' of a 'locomotive and tender'. While a liberal construction of this statute is not necessary to justify this conclusion, it is evident that the amendment should be liberally construed and its obvious purpose effectuated."

The United States Court of Appeals for the Eighth Circuit, in *Louisville & N. R. Co.* v. *Botts,* 173 F. (2d) 164, correctly analyzed the Boiler Inspection Act in relation to orders of the Interstate Commerce Commission, namely, holding that the Act imposes three coordinate, and not simply coincident, conditions for the lawful use of a locomotive:

"(1) All parts of the locomotive must be safe to operate without unnecessary peril to life or limb; (2) the locomotive must have been submitted to the inspection provided for in the Act; and (3) the locomotive and its parts must meet such tests and conform to such standards as the Interstate Commerce Commission may have prescribed or approved."

"These on their face are coordinate conditions and commands, and the clauses therefore are not simply coincident. Thus, under the third clause, the Interstate Commerce Commission could hardly practicably be expected to lay down specifications of every individual item or element involved in the construction of the locomotive and its parts, but plainly Congress did not intend that any such non-prescription by the Commission should operate to relieve a carrier of its absolute obligation under the first clause, not to use any locomotive that is unsafe to operate, without unnecessary peril to life or limb, in the service to which it is

> put. The mere fact therefore that the third clause of the section of the statute has not been violated does not permit of a judicial ruling that there consequently in the present situation has been no violation of the first clause."

The petitioner submits that the Appellate Court's reliance on the decision in *Auschwitz* v. *Wabash Railroad Co.*, 346 Ill. 190, decided in 1931 before the 1939 amendments of the Federal Employers' Liability Act and the current unmistakable trend of the decisions of this Court in relation to these railroad cases, is untenable. The United States Court of Appeals for the 2nd Circuit in *Bolan* v. *Lehigh Valley Railroad Co.*, 167 F. 2d 939, on almost identical facts as those involved in the *Auschwitz* case, said:

> "Accordingly, if an appurtenance conforms with the I.C.C. regulations but nevertheless violates the Act, the latter must control."

We submit that the cases of *Mahutga* v. *M. St. P. & S. S. M. Ry. Co.*, 182 Minn. 262, and *A. T. & S. F. Ry. Co.* v. *Scarlett*, 300 U. S. 471, are clearly distinguishable from the situation in the case at bar.

In the *Mahutga* case, the plaintiff claimed a violation of the Boiler Inspection Act because the railroad company did not provide some means of fastening the cab curtain back, although no such requirement was contained in the order of the Interstate Commerce Commission prescribing in detail the requirements with respect to such curtains. The curtains, in fact, conformed strictly to the requirements of the Interstate Commerce Commission. It was not claimed, as it is in the case at bar, that there was anything out of order, defective or not properly functioning with respect to the appurtenance.

In the *Scarlett* case, the claim was that a ladder on a box car, which was not defective and which complied

with the regulations of Interstate Commerce Commission, violated the Boiler Inspection Act because round brace rods on the side of the car which formed no part of the ladder itself rendered the use of the ladder dangerous despite the fact that the ladder cleared the brace rod more than the minimum distance required by the order of the Interstate Commerce Commission for such clearance.

In the subject action, unlike those cases, there is, as the Appellate Court has said: "An issue of fact to be determined by the jury * * * if * * * (the) defect in the light can be made the basis of an action under the Boiler Inspection Act".

Contrary to the statement in the opinion of the Appellate Court that

> "No claim can be made that the projection of the rays of this light into the air created 'unnecessary peril to life or limb' in the operation of the engine,"

this Court in *Tiller* v. *Atlantic Coast Line Railroad*, 323 U. S. 574, said:

> "The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard."

The Appellate Court's statement that the defective light could not be held to "create" an unnecessary peril to life or limb evidences a grave misapprehension with respect to the requirements of the Boiler Inspection Act. It is not necessary for a defective appliance to "create" an additional hazard, but it is required that all parts and appurtenances of a locomotive should be in such condition as to avoid unnecessary perils.

It cannot be reasonably contended that a rear headlight on the tender which was in such a condition that its light

was thrown upward into the air instead of along the tracks as it was intended, entailed no unnecessary hazard and peril, or that such unnecessary hazard and peril would not have been avoided if the light had shone straight back along the tracks. If it had been in proper working order, it would have disclosed the close proximity of the coal car to the main track long before the situation was or could have been observed by the relator or by the engineer. The violation of the Federal Boiler Inspection Act contributed to cause the relator's injuries.

As was said in *Southern Ry. Co.* v. *Lunsford,* 297 U. S. 398, and as was held in *Lilly* v. *Grand Trunk Railroad Co.,* 317 U. S. 481, and *Hines* v. *Smith,* 275 Fed. 766, a defective part or appurtenance of a locomotive if actually a permanent and integral part thereof, which by reason of the defect fails to avoid unnecessary peril constitutes a violation of the Boiler Inspection Act, whether or not the part or appurtenance is required or covered by any order of the Interstate Commerce Commission.

The railroad company, knowing the service to which the locomotive was to be put, equipped it with a rear light, the only purpose of which could have been to provide for safety when the locomotive was backing in the night season, as the locomotive in the subject action was doing when relator was injured. If it were out of order, entailing unnecessary peril which would have been avoided by having the light in proper condition, the jury was warranted in finding that the Boiler Inspection Act was violated, and that such violation contributed to cause relator's injuries.

The Appellate Court's opinion finally determines the issues in this regard, and erroneously denies and deprives relator of protection under the Federal Boiler Inspection Act.

II.

The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Safety Appliance Act.

The Safety Appliance Act provides: (45 U.S.C. Sec. 11)

> "It shall be unlawful for any common carrier subject to the provisions of section 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * *."

Defendant's counsel, in opening defendant's case to the Court and jury at the outset of the trial, stated among other things partially set forth in the opinion of the Appellate Court (R. 13):

> "Now I notice what Mr. Fuerst said about how the car got there. I do not know if it was put there or whether it had drifted there. In other words, if the brakes were defective in holding the car."

That statement is a plain and unequivocal admission that the Clifford siding sloped down toward the O. P. Main and was a plain statement that the defendant did not contest the fact that the brake on the coal car was defective and inefficient. The statement was never withdrawn or modified up until the time the case was submitted to the jury, and represents the theory upon which the defense was based and is binding on the defendant. *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Allen* v. *United States Fidelity & Guaranty Co.*, 269 Ill. 234; *Peters* v. *General Rug & Carpet Cleaners*, 333 Ill. App. 47; *Kluska* v. *City of Chicago*, 97 Ill. App. 665.

The opinion of the Appellate Court states:

> "The testimony relating to the brakes on the coal car is limited to plaintiff's statement that on going to

> work around 9:15 to 9:20 P. M. he saw a coal car on the spur track about 10 feet from the switch and that a regular brakeman was setting the brake * * * and that several hours later the car was so near the main track as to interfere with the operation of engines and cars on it."

It is apparent from the opinion that the above quoted statement is not literally accurate, and that there was additional evidence that the coal car drifted, due to inefficiency of the brakes, from its safe place 10 feet in on the spur to the place it occupied fouling the main track when plaintiff was crushed between it and the tender in the darkness of midnight. The relator testified, as set forth in the petition for rehearing in the Appellate Court (R. 42-44) that the brake on the coal car was not efficient. This evidence was received on the express withdrawal of an objection which the Court had sustained.

Defendant did not offer any evidence of any character to rebut relator's testimony that the brake was inefficient. It did not call the brakeman who put the coal car on the siding and applied the brake. It did not call anybody who had anything to do with moving the coal car after the accident, and it passes credulity to think that defendant left it in the position fouling the O. P. Main after it had caused injuries to one of its employees. It did not produce any profile map made on actual survey, as it certainly would have done if there were any honest question about whether the coal car drifted to its dangerous position or if there were any honest question as to its direction of the grade of the tracks.

If there was any legitimate issue as to direction of the slope or the inefficiency of the brake on the coal car, all questions relating to such issue were questions of fact for the jury which the Appellate Court cannot redetermine contrary to the determination of the jury in this case,

which is governed by the Federal Employers' Liability Act and the Safety Appliance Act.

Lavender v. *Kurn,* 327 U. S. 645.
Williams v. *New York Central R. Co.,* 402 Ill. 494.
Cusson v. *Canadian Pacific Ry. Co.,* 115 F. 2d 430.

In *Lavender* v. *Kurn,* 327 U. S. 645, it was said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The evidence offered by relator with respect to the inefficiency of the hand brake, that is, its failure to function and to keep the coal car from drifting, is substantial evidence and was sufficient to make the issue one for the jury within the decision of the United States Supreme Court in *Myers* v. *Reading Co.,* 331 U. S. 477; *Didinger* v. *Pennsylvania R. Co.,* 39 F. 2d 798 and *Philadelphia & R. Ry. Co.* v. *Auchenbach,* 16 F. 2d 550, that the hand brake on the coal car was inefficient.

To the same effect:

Spotts v. *Baltimore & O. R. Co.,* 102 F. 2d 160.
Detroit T. & I. R. Co. v. *Hahn,* 47 F. 2d 59.
Anderson v. *Baltimore & O. R. Co.,* 89 F. (2d) 629, Cert. denied, 302 U. S. 696.

Eker v. *Pettibone,* 110 F. 2d 451.
Anderson v. *Chesapeake & O. R. Co.,* 352 Ill. 561.

The Appellate Court, in stating:

> "No inference of inefficiency of the brake can be drawn from the mere fact that plaintiff saw a switchman setting the brake—an incomplete operation—* * *. It must first be shown that the brake was actually set, with due care and in the normal, natural and usual manner."

overlooked the wholly permissible and natural inference which the jury should be permitted to draw, namely, that a regular yard brakeman of defendant setting a brake would do so with due care and in the normal, natural and usual manner. This under these Federal Acts was within the province of the jury, and not within the province of the Appellate Court. Furthermore, the erroneous and gratuitous assumption by the Appellate Court in the use of the phrase "incomplete operation" is not borne out by the record. It only takes a fraction of a minute to set a brake. In railroad parlance, the relator's testimony that he saw a regular yard brakeman setting the brake means that he saw the brake applied in a proper manner,—a complete operation, which twelve jurors believed to be the fact.

III.

The relator is irreparably prejudiced and damaged by the decision of the Appellate Court and the refusal of the Illinois Supreme Court to correct it.

The only question on any new trial of this action under the opinion of the Appellate Court will be the amount of the damages to be awarded to relator by another jury. In view of defendant's admission of its liability under the Federal Employers' Liability Act, a recovery of damages by the relator in some amount is certain, inasmuch as any

negligence on the part of relator which the new jury might find contributed to cause relator's injuries would not bar, but would merely diminish, the amount of his recovery.

If the evidence on the new trial with respect to defendant's violation of the Federal Boiler Inspection and Federal Safety Appliance Act be the same as it was on the first trial, relator will be denied the benefits of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 53, to the effect that he shall not

> "* * * be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Apart from the delay in the ultimate determination of the amount of damages to which relator is entitled, the relator, by the decision of the Appellate Court, has been and will continue to be deprived of a jury determination on a new trial of the issues involved in his assertion of federally created rights under the Federal Boiler Inspection and Safety Appliance Act, which were properly determined by the jury and the Trial Court on the first trial in complete accord with the federal decisional law. On a new trial, the Trial Court would be bound to conform to the opinion of the Appellate Court, and if the evidence be the same, the relator would be deprived of his statutory rights provided for him by the Federal Safety Statutes, erroneously eliminated from this case by the Appellate Court. Any appeal by relator which might lie from the judgment in his favor at the new trial, would have to be prosecuted beyond the Appellate Court, if such discretionary appeal be allowed, to correct the errors now belaboring the case, and the only relief that could be granted would be to order

a third trial in order to restore to the relator the benefit and protection of the Federal Safety Statutes in accord with the judgment he has properly obtained or possibly to reinstate that judgment.

In other words, the decision of the Appellate Court to the effect that relator is not entitled to recover under the Boiler Inspection Act or the Safety Appliance Act is final, short of corrective action by this Court.

In these circumstances, we submit that it would be unconscionable to require relator to go through the empty gesture of a new trial, particularly since the relator has already lost over $10,000 in wages as a result of the injuries wrongfully inflicted on him by the defendant, with its attendant delay and expense, when this Court can now correct the situation, and conscientious observance of the law requires this Court to do so now.

IV.

The relator has been wrongfully deprived of his right to a trial by jury guaranteed to him by the 7th Amendment of the Constitution of the United States and Article II, Sec. 5 of the Constitution of the State of Illinois, and has been denied equal protection of the law in contravention of the 14th Amendment of the United States Constitution and subjected to a judicial wrong in violation of Article II, Sec. 19 of the Constitution of the State of Illinois.

Relator asserts and claims that he has been denied the right to trial by jury of the factual issues relative to his right to recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act, in violation of the provisions of the 7th Amendment of the Constitution of the United States and Article II, Sec. 5 of the Constitution of the State of Illinois, and that he has been denied equal protection of the law by the decision of the Appellate Court in violation of the provision of the 14th Amendment of the Constitution of the United States.

Relator asserted and claimed his constitutional rights at the first opportunity, namely, in his motion in the Appellate Court for a rehearing and for leave to appeal to this Court (R. 31-47). Relator's constitutional rights as above set forth were infringed and violated for the first time when the Appellate Court made and filed its decision on defendant's appeal from the judgment in relator's favor. Relator duly demanded (R. 6, 7) and was properly accorded a trial by jury in the Superior Court of Cook County, and the factual issues with respect to his right to recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act were properly tried and submitted to the jury in the Superior Court of Cook County. It was not until the Appellate Court handed down its decision to the effect that relator was not entitled to recover under either of these safety statutes that his constitutional rights were invaded. He promptly and clearly claimed his constitutional rights at the first opportunity in his motions in the Appellate Court for a rehearing and for leave to appeal, and such claims were necessarily passed on by the Appellate Court when it denied the motions (R. 27-28, 31-33, 46-47).

It is perhaps unnecessary to argue the question whether the law under the recent decisions of this Court has progressed with reference to the questions involved in the case at bar to the point which overrules or modifies its decision in *Minn. & St. Louis R. R. Co.* v. *Bombolis,* 241 U. S. 211.

It is certain, however, as stated in Mr. Justice Douglas' concurring opinion in *Wilkerson* v. *McCarthy,* 336 U. S. 53, that by the recent decisions of this Court:

> "The historic role of the jury in performing that function (whether the jury function in passing on disputed questions of fact and in drawing inferences

from proven facts has been respected) * * * is being restored in this important class of cases."

As stated in *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350:

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence * * * It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act * * * The jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries' * * * To deprive these workers of the benefit of a jury trial in close but doubtful cases is to take away a good portion of the relief which Congress has afforded them."

In *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, it was said:

"There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. *Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states.* * * * It is true that this Court has held that a state need not provide in F.E.L.A. cases any trial by jury according to the requirements of the Seventh Amendment. * * * But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question." (Emphasis ours.)

This Court said in *Brown* v. *Western Railway of Alabama*, 338 U. S. 294:

"Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springs the

State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' *Davis* v. *Weschler, supra,* 263 U. S. at page 24; Cf. *Maty* v. *Grasselli Chemical Co.,* 303 U. S. 197. Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, *desirable uniformity in adjudication of federally created rights could not be achieved.* See *Brady* v. *Southern R. Co.,* 320 U. S. 476, 479." (Emphasis ours.)

The Appellate Court's opinion clearly demonstrates, and its decision constitutes, an invasion of relator's constitutional rights by repudiating, without any justification, the jury's fact-finding function in this case as to relator's right to recover under both safety statutes. Furthermore, in order to contravene and intercept the rights to a jury determination of the factual issues in that connection, and to the equal protection of the law, guaranteed to plaintiff by the Federal and State Constitutions, the Appellate Court ingeniously devised its own findings of fact contrary to those of the jury imported by its general verdict, and its own interpretation of the Boiler Inspection and Safety Appliance Acts, thereby completing its denial of plaintiff's constitutional rights.

It ignores the commands of the decisional law of this Court, requiring uniform administration and equal protection of plaintiff's federally created rights.

It is now clear, from the language of the Court, and the actual decisions in the *Urie* and *Brown* cases, *supra,* that the twilight zone of distinction between substantive and procedural rights heretofore existing has been abolished; that the intent and purpose of the Congressional enactments in the Federal Employers' Liability Act, the Fed-

eral Boiler Inspection Act, and the Federal Safety Appliance Act, must be administered with equality and uniformity throughout the entire nation, whether the appeal for justice be to a Federal or to any State Court; and that all cases arising under these Federal Acts shall be determined as to substance, notwithstanding any local procedural law, in accordance with the federal decisional law. It is equally clear that these rules and principles have been flagrantly violated in the subject action.

In *Urie* v. *Thompson,* 337 U. S. 163, it was said:

> "Whatever the effect of the state supreme court's ruling for further proceedings in the state courts, it could not impose such an alternative upon petitioner (waiving the right to a new trial). Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review."

As we have before pointed out, the Appellate Court's decision to the effect that the relator cannot recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act is final and deprives the relator of the equal protection of the law and "desirable uniformity in adjudication of federally created rights."

It is submitted that in the situation in which the relator has been put by the decision of the Appellate Court, the only effective remedy open to him is by review and reversal or expunging of the Appellate Court's decision at this stage of the proceedings, and that any obstacle of a technical or procedural nature should not deter this Honorable Court in reviewing that decision. To all intents and purposes it is final as to relator's right to recover under the Federal Safety Statutes. It is grossly and in-

defensibly wrong and the relator has no remedy except in the hands of this Court.

Respectfully submitted,

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HARRY G. FUERST,
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Of Counsel.

APPENDIX.

Federal Employers' Liability Act (45 U.S.C. Sec. 51):

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

Federal Employers' Liability Act (45 U.S.C. Sec. 53):

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66."

Federal Boiler Inspection Act (45 U.S.C. Sec. 23):

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to

operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, Sec. 2, 36 Stat. 913; Mar. 4, 1915, c. 169, Sec. 1, 38 Stat. 1192; June 7, 1924, c. 355, Sec. 2, 43 Stat. 659."

Federal Safety Appliance Act (45 U.S.C. Sec. 11):

"It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * * Apr. 14, 1910, c. 160, Sec. 2, 36 Stat. 298."

Rules of Interstate Commerce Commission.

Rule 101. The railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control. (Code of Federal Regulations, Title 49, Parts 1-91, Sec. 91.101, p. 1236)

Rule 129. (a) Locomotives used in road service.— Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

(b) Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear a headlight which shall meet the foregoing requirements.

(c) Such headlights shall be provided with a device whereby the light from same may be diminished in yards and at stations or when meeting trains.

(d) When two or more locomotives are used in the same train, the leading locomotive only will be required to display a headlight. (Code of Federal Regulations, Title 49, Parts 1-91, Sec. 91.129)

Rule 131. Locomotives used in yard service.—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition. (Code of Federal Regulations, Title 49, Parts 1-91, Sec. 91.131)

Rules of Appellate Court of Illinois—First District.

Rule 36. Without regard to the amount involved, this Court and each division thereof shall designate for publication in full in Appellate Court Reports, only such written decisions of such court as contain a discussion of a new or doubtful question of law, or involve the application of rules of law to a novel state of fact, or decide a new or unsettled question of practice.

MAY 15 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. ~~738~~ 43

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS,
Petitioner,

vs.

JOHN M. TUOHY, PRESIDING JUSTICE, GROVER C. NIEMEYER AND MICHAEL FEINBERG, JUSTICES, CONSTITUTING THE FIRST DIVISION OF THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT.
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Petitioner seeks to have this Court review the refusal of the Supreme Court of Illinois to entertain an original mandamus action against the Justices of the Appellate Court of Illinois to compel them to reverse their action of awarding a railroad company a new trial in an action by petitioner under the Federal Employers' Liability Act, the Boiler Inspection Act, and the Safety Appliance Act.

Under the law of Illinois the order of the Appellate Court awarding a new trial was not a final appealable order and petitioner therefore had no appeal to the Supreme Court of Illinois. In an effort to avoid a new trial and to circumvent the non-appealable character of the Appellate Court new trial order, petitioner attempted to utilize mandamus as a means of indirect appeal. The Supreme Court of Illinois denied his motion for leave to file a mandamus petition without opinion. That order is plainly sustainable on the basis of Illinois law independent of the federal questions asserted.

The present petition for certiorari is not based on the record which was before the Appellate Court on the original appeal but consists of allegations of counsel in the attempted mandamus proceeding. These allegations set up only part of the Appellate Court record and the petition contains numerous incorrect and unsupportable assertions of both fact and law. For example, it is asserted that the railroad "in effect admitted" that a car drifted because of an "inefficient handbrake" (Pet. p. 4; to the same effect, pp. 8, 12, 13, 27); that, although petitioner was awarded another trial, he has "finally and irrevocably been deprived of the benefit of the Boiler Inspection Act" (Pet. pp. 4, 20) and that the Appellate Court has "for all time" deprived him of his rights under the Safety Appliance Act (Pet. p. 13). Each and all of these we deny to be correct.

However, regardless of the merit or lack of merit, either in petitioner's factual assertions or in his contentions as to alleged errors by the Appellate Court of Illinois, this honorable Court lacks jurisdiction to review the action of the Supreme Court in denying leave to file an original mandamus action against the Justices of the Appellate Court. Under Illinois law original mandamus in the

Supreme Court cannot be used as a means of indirect appeal from a non-appealable order of the Appellate Court. Therefore, while the attempted mandamus action in the Supreme Court of Illinois presented asserted federal questions, the refusal of that Court to entertain the action is sustainable on grounds independent of a determination of the federal questions.

POINTS AND AUTHORITIES.

I.

THE ORDER OF THE SUPREME COURT OF ILLINOIS DENYING WITHOUT OPINION, PETITIONER'S MOTION FOR LEAVE TO FILE AN ORIGINAL PETITION FOR MANDAMUS AGAINST THE JUSTICES OF THE APPELLATE COURT OF ILLINOIS IS SUSTAINABLE UPON THE BASIS OF ILLINOIS LAW, INDEPENDENT OF ANY ASSERTED FEDERAL QUESTIONS, AND THIS HONORABLE COURT IS THEREFORE WITHOUT JURISDICTION TO REVIEW IT.

A.

Even When Mandamus Is a Proper Remedy Under Illinois Law the Exercise of the Supreme Court's Original Jurisdiction in Mandamus Is Discretionary With That Court

Article VI § 2, Ill. Const. 1870.

Rule 46, Supreme Court of Illinois (Ch. 110 § 254.46, Ill. Rev. Stats., 1949).

People v. *Haas*, 239 Ill. 320.

People v. *Graber*, 394 Ill. 351, 368.

People v. *Board of Education*, 197 Ill. 43.

People v. *City of Chicago*, 193 Ill. 507.

Monroe v. *Collins*, 393 Ill. 553, 557.

B.

Under Illinois Law Original Mandamus Actions In the Illinois Supreme Court Cannot Be Used to Correct Alleged Erroneous Judgments of Inferior Tribunals.

People v. *Holmes*, 312 Ill. 284.

People v. *Ehler*, 353 Ill. 595.

People v. *Donoghue*, 377 Ill. 122.

People v. *Green*, 355 Ill. 468.

People v. *Lewe*, 383 Ill. 549.
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People v. *Graber*, 394 Ill. 362.
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C.

While the Supreme Court of Illinois Has Entertained Original Mandamus Actions to Compel Inferior Tribunals to Expunge Orders Void for Want of Jurisdiction, the Judgment of the Appellate Court, Even if Erroneous, Was Not Void for Lack of Jurisdiction.

Ch. 37 § 32, Ill. Rev. Stats., 1949.
People v. *Leavens*, 288 Ill. 447, 448.
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D.

Under Illinois Law the Illinois Supreme Court Did Not Have Jurisdiction to Review the Judgment of the Appellate Court on an Appeal From That Court Since Its Judgment Was Not Final.

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E.

Whether Original Mandamus in the Illinois Supreme Court Was an Available Remedy to Correct the Alleged Erroneous Judgment of the Appellate Court Is Solely a Question of State Law.

McClung v. *Silliman*, 6 Wheat. 598, 603.
John v. *Paullin*, 231 U. S. 583, 585.

F.

The Refusal of the Supreme Court of Illinois to Entertain the Original Mandamus Action Rests on Adequate Non-Federal Grounds and This Honorable Court Is Therefore Without Jurisdiction to Review It.

Lynch v. *New York*, 293 U. S. 52, 54.
Allen v. *Arguimbau*, 198 U. S. 149, 154.
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ARGUMENT.

I.

THE ORDER OF THE SUPREME COURT OF ILLINOIS DENYING, WITHOUT OPINION, PETITIONER'S MOTION FOR LEAVE TO FILE AN ORIGINAL PETITION FOR MANDAMUS AGAINST THE JUSTICES OF THE APPELLATE COURT OF ILLINOIS IS SUSTAINABLE UPON THE BASIS OF ILLINOIS LAW, INDEPENDENT OF ANY ASSERTED FEDERAL QUESTIONS, AND THIS HONORABLE COURT IS THEREFORE WITHOUT JURISDICTION TO REVIEW IT.

Petitioner's motion in the Supreme Court of Illinois for leave to file a petition for writ of mandamus against the Justices of the Appellate Court was accompanied by the proposed petition itself (R. 3-103). The proposed petition consisted of: (1) allegations of counsel setting forth selected portions of the trial record carried on appeal in the Appellate Court of Illinois in an action entitled, "*William Edward Woods, Appellee,* v. *The New York, Chicago and St. Louis Railroad Company, a corporation*"; and (2) a record of the Appellate Court proceedings including therein the opinion rendered by respondent Appellate Court judges (R. 11-15) and their order of reversal of a judgment in the original plaintiff's favor and remandment of the case to the Superior Court of Cook County, Illinois, for a new trial (R. 26).

The opinion shows that the petitioner as the original plaintiff had recovered a judgment for $40,000 against The New York, Chicago and St. Louis Railroad Company in the Superior Court of Cook County on a jury verdict in an action brought under the Federal Employers' Liability Act (45 U. S. C. §§ 51-59), Federal Safety Appliance Act (45 U. S. C. § 11) and the Federal Boiler Inspection

Act (45 U. S. C. § 23). On appeal the railroad assigned a number of errors, the principal contentions being that the Trial Court "erred in giving instructions permitting recovery under the Safety Appliance and Boiler Inspection Acts because there is no evidence of a violation of either, and, that the damages awarded are excessive'" (R. 12). Respondents, as Justices of the Appellate Court, found it necessary to pass only on the first mentioned contention. They concluded that there was no evidence tending to prove a violation of the two safety acts mentioned; that the Trial Court accordingly erred in giving instructions permitting recovery under them; that under these acts contributory negligence cannot be asserted either as a defense or in mitigation of damages, but that it must be considered in reduction of damages under the Federal Employers' Liability Act; that "the damages awarded [$40,000] are large and it may be that the jury, relying on the instructions relating to the Safety Appliance and Boiler Inspection Acts, failed to consider the question of contributory negligence in making the award" (R. 14).

The opinion of respondents as Justices of the Appellate Court of Illinois reflects respondents' interpretation of the law applicable to the record that was before it, and we submit that it is eminently correct. But it would serve no useful purpose to write a brief justifying that opinion or undertaking to answer counsel's intemperate criticism of it (Pet. p. 28) since the judgment of new trial pursuant thereto is not reviewable by this Court in the manner attempted. The action of the Supreme Court of Illinois in denying petitioner's motion for leave to file a mandamus petition against respondents and thus by indirection secure a review of respondents' interlocutory order on a partial and incomplete record is sustainable on the basis of well settled Illinois law.

A.

Even When Mandamus Is a Proper Remedy Under Illinois Law the Exercise of the Supreme Court's Original Jurisdiction in Mandamus Is Discretionary With That Court.

The original mandamus jurisdiction of the Supreme Court of Illinois is derived from Article VI § 2 of the Illinois Constitution of 1870, which provides:

> "The Supreme Court shall consist of seven judges, and shall have original jurisdiction in cases relating to the revenue, *in mandamus* and *habeas corpus* and appellate jurisdiction in all other cases."

The institution of original mandamus proceedings in the Supreme Court is regulated by Rule 46 of that Court which provides:

> "Mandamus proceedings in the Supreme Court shall be instituted by filing a motion, supported by suggestions for leave to file a petition seeking a writ of mandamus. Such motion shall be heard *ex parte*, and if it be allowed, summons shall issue, returnable within such time as the Court shall direct in the order permitting the filing of the petition." (Ill. Rev. Stats., 1949, ch. 110 § 254.46.) See, also, *People* v. *Haas*, 239 Ill. 320.

Even where mandamus is an available remedy it is firmly settled in Illinois that the exercise by the Supreme Court of its original jurisdiction in mandamus is discretionary. *People* v. *Graber*, 394 Ill. 362, 368. That Court has held that the constitutional provision above quoted only requires the Court to take original jurisdiction in such matters as pertain to the public interest, either on behalf of the State or some officer of the State, or in such cases of emergency as the Court, exercising a sound legal discretion deems proper to entertain; that it will not grant leave to file a petition where the matter is of local interest only. *People*

v. *Board of Education,* 197 Ill. 43; *People* v. *City of Chicago,* 193 Ill. 507. In *Monroe* v. *Collins,* 393 Ill. 553, 557, the Court expounded at some length on some of the factors which induce it to deny leave to file an original action in mandamus, but refused "to specify all the grounds on which a leave to file may be denied." (p. 557.)

B.

Under Illinois Law Original Mandamus Actions In the Illinois Supreme Court Cannot Be Used to Correct Alleged Erroneous Judgments of Inferior Tribunals.

In the instant case the Court gave no reasons for denying leave to file the petition. But whatever the reason or reasons that induced the Court to deny leave, its refusal is sustainable on the basis of Illinois law, independent of any asserted federal questions. The procedure attempted by petitioner to secure an indirect review of the Appellate Court's interlocutory judgment is not permissible under Illinois law.

It has been held repeatedly that mandamus cannot be used to control judicial discretion or to review the action of a tribunal in any matter involving the examination of evidence and the decision of questions of law and fact; *People* v. *Holmes,* 312 Ill. 284; that it does not lie to direct or modify the exercise of judicial discretion by a Court. *People* v. *Ehler,* 353 Ill. 595; *People* v. *Donoghue,* 377 Ill. 122; that, where a Court has jurisdiction of the proceedings and of the parties, its judgment is not void, and whether it was right or wrong cannot be inquired into by mandamus. *People* v. *Green,* 355 Ill. 468; *People* v. *Lewe,* 383 Ill. 549; *People* v. *Fisher,* 372 Ill. 146; *People* v. *Cook,* 311 Ill. 429. As said by that Court in *People* v. *Shurtleff,* 353 Ill. 248, 259:

"It is not the office of the writ of mandamus to re-

> view the orders, judgments or decrees of courts for error in their rendition or to correct, direct or control the action of a judge in any manner which he had jurisdiction to decide."

As part of the record in this Court petitioner has included his Illinois Supreme Court brief in support of the petition for leave to file a mandamus action (R. 51-92). It appears therefrom that his first proposition was:

> "This [Illinois Supreme] Court has power to order the judgment of the Appellate Court expunged and the judgment of the Superior Court of Cook County affirmed by writ of mandamus."

In support of that contention a number of decisions were cited, but examination of them reveals that they were all cases where the Illinois Supreme Court entertained an original petition for mandamus to compel a judge of an inferior court to expunge an order which was void for want of jurisdiction to enter it. (*People* v. *Graber,* 394 Ill. 362; *People* v. *Graber,* 397 Ill. 518; *People* v. *Keeney,* 399 Ill. 611.)

The legal conclusion in the petition in the Illinois Supreme Court that the judgment of the Appellate Court was "void" (R. 28) and the same assertion made in the brief is so utterly frivolous as to raise doubts as to whether it was made in good faith.

C.

While the Supreme Court of Illinois Has Entertained Original Mandamus Actions to Compel Inferior Tribunals to Expunge Orders Void for Want of Jurisdiction, the Judgment of the Appellate Court, Even if Erroneous, Was Not Void for Lack of Jurisdiction.

That the original appeal was properly taken from the Superior Court of Cook County to the Appellate Court and that that Court properly had jurisdiction of the case is

not contested. Indeed, no contention was made in the motion to the Illinois Supreme Court that the appeal was not properly taken to the Appellate Court; the assertion was that the judgment of the Appellate Court was so erroneous as to be "void" (Ill. Sup. Ct. br., pp. 9-11).

However, it is settled law in Illinois that "jurisdiction of the subject matter is authority to hear and decide a cause and does not depend on the correctness of the decision entered." *People* v. *Leavens,* 288 Ill. 447, 448; *People* v. *Hill,* 344 Ill. 246. As said by the Court in *O'Brien* v. *People,* 216 Ill. 354, 364; and *Baker* v. *Brown,* 372 Ill. 336: "Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be." Or, as put in *Murch* v. *Epley,* 385 Ill. 138, 145, "jurisdiction to hear and decide a cause necessarily includes the right to render an erroneous decision." The fact that the Appellate Court actually had jurisdiction is recognized by the prayer of the petition which was that respondents should be commanded to affirm the judgment of the Superior Court (R. 30).

D.

Under Illinois Law the Illinois Supreme Court Did Not Have Jurisdiction to Review the Judgment of the Appellate Court on an Appeal From That Court Since Its Judgment Was Not Final.

The Supreme Court of Illinois did not have jurisdiction to review the judgment of the Appellate Court on a direct appeal since the Appellate Court judgment was not final. Under the law of Illinois a review of the judgments, orders and decrees of the Appellate Court by the Supreme Court can only be had where any such judgment, order or decree of the Appellate Court is a final order. (Ch. 110, § 199 (2)(b), Ill. Rev. Stats., 1949); *Dowdall* v. *Hutchens,*

347 Ill. 326, 327; *Cowen* v. *Harding Hotel Co.*, 396 Ill. 477, 479. Judgments, orders and decrees of the Appellate Court are final only when they are such as to put an end to the litigation by determining the rights of the parties therein. *Fanning* v. *Rogerson*, 142 Ill. 478; *Morris* v. *Beatty*, 390 Ill. 568, 574; *Cowen* v. *Harding Hotel Co.*, 396 Ill. 477, 479. In other words, the judgment, order or decree must finally dispose of the merits of the case in such manner that no further proceedings can be had in the lower court except to carry into effect the mandate of the Appellate Court. *People* v. *Board of Education*, 275 Ill. 195, 196. Accordingly, it has been held in numerous cases that a judgment of the Appellate Court reversing the judgment of the Trial Court, and remanding the cause for such other and further proceedings as to law and justice shall appertain, is not a final judgment from which an appeal will lie to the Supreme Court. *Buck* v. *County of Hamilton*, 99 Ill. 507; *Knapp, Stout & Co.* v. *Ross*, 181 Ill. 392, 395; *Wolkau* v. *Wolkau*, 280 Ill. 298, 299; *Streeter* v. *Humrichhouse*, 357 Ill. 234, 238; *People* v. *Board of Education*, 275 Ill. 195, 196. Similarly, a judgment of the Appellate Court reversing and remanding a cause for a new trial is not appealable from the Appellate Court to the Supreme Court. *Riley* v. *Lamson*, 253 Ill. 258; *Corcoran* v. *City of Chicago*, 373 Ill. 567, 569.

It is obvious that if the Supreme Court of Illinois should permit original mandamus actions to be instituted in that Court against the Justices of the various Appellate Courts to compel them to expunge alleged erroneous interlocutory and non-appealable orders, it would be flooded with such petitions and the statutory limitation that its power of review be exercised only as to final orders would be evaded. The mere fact that the judgment rendered by the Appellate Court was in a case in which petitioner asserted fed-

eral rights could not serve to enlarge the jurisdiction of the Illinois Supreme Court. And that Court is the final arbiter of the extent of its jurisdiction and the availability of original mandamus as a remedy.

E.

Whether Original Mandamus in the Illinois Supreme Court Was an Available Remedy to Correct the Alleged Erroneous Judgment of the Appellate Court Is Solely a Question of State Law.

It follows from what has been said above that the order of the Supreme Court of Illinois is sustainable on purely State grounds. This Court said in *John* v. *Paullin,* 231 U. S. 583, 585:

> "Without any doubt it rests with each State to prescribe the jurisdiction of its Appellate Courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local and general law."

F.

The Refusal of the Supreme Court of Illinois to Entertain the Original Mandamus Action Rests on Adequate Non-Federal Grounds and This Honorable Court Is Therefore Without Jurisdiction to Review It.

The present petition for certiorari does not call for any extended review of the authorities holding that a petitioner must show that a decision of a State Court could not have been made without deciding a federal question. This Court has held that where the Supreme Court of Illinois has refused, without opinion, to entertain an original action

(*habeas corpus*) and this Court was unable to say that the refusal did not rest on an adequate non-federal ground, the writ of certiorari must be denied. *White* v. *Ragen*, 324 U. S. 760. In the case at bar Supreme Court has refused, without opinion, to entertain an original *mandamus* action and numerous and adequate non-federal grounds for such refusal exist. *White* v. *Ragen*, of course, merely follows the general rule of *Lynch* v. *New York*, 293 U. S. 52, 54. In that case this Court said (p. 54):

> "It is essential to the jurisdiction of this Court in reviewing a decision of a Court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest Court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * * Where the judgment of a state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. * * *"

In *Allen* v. *Arguimbau*, 198 U. S. 149, 154, cited in the foregoing case, this Court said:

> "The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad, but if the judgment rested on two grounds, one involving a federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

In *Cuyahoga Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 304, also cited in the *Lynch* case, this Court said:

> "* * * the case presents the single question of

> what principle is to be applied where from an absence of an opinion expressed by the Court below it is impossible to say whether its judgment was rested upon State questions adequate to sustain it independent of the federal questions or upon such federal questions, both being in the case. But the rule which controls such a situation has long prevailed and was clearly expressed in *Allen* v. *Arguimbau,* 198 U. S. 149, 154-155 * * *."

And in *Woods* v. *Nierstheimer,* 328 U. S. 211, this Court held it was without power to review a judgment of an Illinois *nisi Prius* court denying a petition for *habeas corpus* where the denial of the petition could have rested, and probably did rest, on the grounds that *habeas corpus* was not a proper remedy in the case under Illinois law.

Petitioner's Authorities Distinguished.

Petitioner has cited the following cases as sustaining the jurisdiction of this Court: *Brown* v. *Western Railway of Alabama,* 338 U. S. 294; *Urie* v. *Thompson,* 337 U. S. 163; *United States Alkali Export Association* v. *United States,* 325 U. S. 196; *House* v. *Mayo,* 324 U. S. 42; *Ex Parte Republic of Peru,* 318 U. S. 578 (Pet. p. 7). None of the cases has the remotest relevancy.

The *Urie* and *Brown* cases are cases where this Court reviewed on certiorari *final* judgments of State Courts in denying recovery under the Boiler Inspection Act in one case (*Urie*) and the Federal Employers' Liability Act in the other (*Brown*). Neither case presented the question as to whether the judgment of the State Court was sustainable on an independent State ground.

The other three cases cited concern this Court's power to issue various writs to lower Federal Courts under for-

mer Section 262 (now Title 28 § 1651) of the Judicial Code and have nothing to do with Courts outside the federal system.

Because the order of the Supreme Court of Illinois is sustainable on adequate and independent non-federal grounds, the petition for certiorari should be dismissed.

Respectfully submitted,

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May 3, 1950.

FILED
SEP 8 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 43

PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS,
Petitioner,

v.

JOHN M. TUOHY, Presiding Justice, GROVER C. NIEMEYER and MICHAEL FEINBERG, Justices, constituting the First Division of the Appellate Court of Illinois for the First District, *Respondents.*

PETITIONER'S REPLY BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 43

PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS,
Petitioner,

v.

JOHN M. TUOHY, Presiding Justice, GROVER C. NIEMEYER and MICHAEL FEINBERG, Justices, constituting the First Division of the Appellate Court of Illinois for the First District, *Respondents.*

PETITIONER'S REPLY BRIEF.

Your petitioner believes that the interest of justice requires him to reply to respondents' brief in opposition to his petition for writ of certiorari in this cause, and that the interest of clarity and justice warrants the filing of a reply brief.

References (R.) are to the transcript of record on the leave to appeal proceeding, bound in the customary brown binding, except where otherwise indicated by (E. R.) in which instances the references are to the transcript of record, bound in gray, on the writ of error proceeding.

In this way, the misstatements of law and fact and the evasions and omissions contained in respondent's brief, can and will be fully demonstrated, to the end that the iniquitous disregard by the Appellate and Supreme Courts of Illinois of petitioner's statutory and constitutional rights be brought to light, and that the legalistic smoke-screen with which respondent seeks to enshroud and camouflage the gross injustice inflicted upon petitioner, be dispelled.

The petitioner's reply presents with clarity and fullness, the answers to all of the issues impelling this Court to reinvest this petitioner with all his legal and equitable rights that both the congressional laws and the Constitution of the State of Illinois and the United States have bestowed upon him. All of these rights the record patently discloses have been despoiled and destroyed by the Illinois Courts, as a result of which the petitioner has lost wages in the amount of $14,000.00 to date.

The respondent railroad company contends, in fine print, (Resp. Brief in No. 125, pp. 11-12) that even though petitioner will be precluded from recovering under the Federal Boiler Inspection Act on a second trial of this action under the opinion of the Illinois Appellate Court he could, after a foredoomed appeal to the Appellate Court, petition the Supreme Court of Illinois for leave to appeal. If the Supreme Court of Illinois should finally hold that the petitioner was entitled on the evidence already adduced to the instructions which were given with respect to the Boiler Inspection and Safety Appliance Acts, the petitioner could then have a third trial to vindicate his rights subject to further appeals and further delay. What chance would this petitioner have on a second or third appeal to the Supreme Court of Illinois in view of its conduct in refusing to correct the gross injustice which the Appellate Court has inflicted upon petitioner?

It is safe to predict that petitioner's loss of earnings by the time this protracted course of litigation is finally concluded will have doubled or tripled that already sustained,

provided the petitioner can stand the expense of such protracted litigation and lives to see it through. There is no truer axiom in this situation than, "Justice delayed is justice denied."

Respondent in No. 43 does not dispute, but tacitly admits, that the refusal of the Illinois Supreme Court to permit petitioner to file his proffered petition for writ of mandamus has *every attribute of finality* of the highest court of the State to enable this court *to review the ruling of the Illinois Supreme Court* under the provisions of Sec. 1257 (3) of Title 28 of the United States Code. The respondent affirmatively admits (Resp. Brief in No. 43, p. 3) that the mandamus action presented federal questions; however, they contend that this erroneous decision of the Illinois Supreme Court which they studiously and understandably refrain from undertaking to defend on the merits, is sustainable under Illinois law. We assert that under Illinois law this contention is base and fallacious. The reasons are two-fold:

1. The substantive rights and liabilities of the parties are created and defined exclusively by federal law, statutory and constitutional, and must be determined uniformly in all courts throughout the nation, including the courts of the State of Illinois, in accordance with federal decisional law.

2. The local law of Illinois and the rules of Illinois courts relating to and regulating practice and procedure governing appeals and other forms of review do not present the type of non-federal question behind which the glaring errors of the Illinois Appellate and Supreme Courts in the decision of the substantive federal questions in this cause can find immunity from correction by this Court.

Respondent's contention in No. 125 is that the orders of the Illinois Appellate and Supreme Courts are not "final judgments or decrees" within the meaning of 28 U. S. C.

Sec. 1257 and it attempts to brush off the power and jurisdiction conferred on this Court by Section 1651 of Title 28, United States Code, by a dogmatic and unsupported footnote to the effect that that section is not a source of jurisdiction to review state court judgments.

The Court must repudiate respondent's contention; otherwise the desired uniformity which this Court has emphatically said must be applied in all courts, state and federal, for the protection of the injured interstate carrier employees, would fail.

The claim by the respondent that the record does not support petitioner's contentions that the decisions of the Appellate and Supreme Courts of Illinois denies to him the constitutional guaranty of his right to a trial by jury, and of equal protection of the laws and do not nullify his federally created rights provided by the Federal Employers' Liability Act, the Federal Boiler Inspection Act and the Federal Safety Appliance Act, is as baseless as it is false.

Does respondent's counsel believe that this Court will not examine the record, including the proceedings on and the evidence adduced at the trial; likewise the Appellate Court's opinion and the subsequent proceedings, before passing on these applications for certiorari?

Does not the record (R. 55-57; ER. 7-9) contain an admission of guilt, both under the Federal Employers' Liability Act and the Federal Safety Appliance Act, made by counsel and spokesman for the railroad company at the opening of the trial, a year after he had taken petitioner's deposition by which the railroad company and its counsel was fully informed of petitioner's claims as to the inefficiency of the hand-brake on the coal car which permitted it to drift from a safe to an unsafe place after the brake was applied? (R. 56, 84, ER. 8, 36)

Is it not true that petitioner testified that the rear headlight on the tender of the backing locomotive was defective, and looked as if it had been smashed and as if the reflector was off, and that it was out of focus and cast its light up

in the air at an angle of about 45 degrees, leaving the area of 50 to 75 feet immediately behind the backing tender in complete darkness and disabling him from seeing the fouling coal car until it was too late for him to get to a place of safety and to avoid the grievous injuries he sustained when he was caught, crushed, and rolled in the narrow space between the side of the backing tender and the side of the fouling coal car?

Did not the Appellate Court, to which this same counsel again admitted liability in his printed brief and oral argument in open court, state in its opinion that petitioner's testimony as to the defect of the rear headlight created a jury question if the defect of the rear headlight could be made the basis of a violation of the Boiler Inspection Act?

Does counsel expect this Court to subscribe to the proposition that the permanent fixed-focus rear headlight was not a part and an appurtenance of the locomotive and within the scope and command of the Federal Boiler Inspection Act irrespective of the particular use to which the locomotive was being put at the precise moment of injury, and irrespective of the limited requirements of the rules of the Interstate Commerce Commission even under the far too narrow construction which the Appellate Court has ascribed to them?

Does counsel seriously expect this Court to say that a bad back-up or rear headlight permanently affixed to the tender by a fixed-focus method of application to light the way through the darkness of an unlit railroad yard, is better than no light at all and constitutes no violation of the Federal Boiler Inspection Act because it "created" no additional peril, despite the fact that the peril which resulted in petitioner's injury would not have existed if the back-up light had been in proper condition, lighting the area of greatest danger in the immediate vicinity of the backing tender and enabling petitioner to see the fouling coal car in time to avoid injury, notwithstanding the admitted negligence of the railroad company in permitting the coal car to

be in its dangerous position fouling a main track of a busy railroad yard?

Do respondents contend that the opinion and ruling of the Illinois Appellate Court on the subject of petitioner's right to recover full damage, if the railroad company used a locomotive with a back-up light which was defective and out-of-order and failed to perform the function it was designed and intended to perform, as the jury was concededly warranted to find in this case, do not constitute a final, conclusive and binding bar, upon any new trial under that opinion, to petitioner's right to full damages because of the violation by the railroad company of the provisions of the Federal Boiler Inspection Act irrespective of negligence which any jury might conceivably attribute to petitioner?

Do respondents contend that on any new trial different or additional evidence can alter the basis or avoid the effect of the Appellate Court decision on this subject?

Can respondents suggest any new, different or additional evidence which would raise the bar to petitioner's right to recover under the Appellate Court's opinion for violation by the railroad company of the provisions of the Federal Boiler Inspection Act in using a locomotive in backward motion with a defective back-up or rear headlight?

Do respondents contend that the railroad company at any time during the trial claimed or asserted that it was entitled to any diminution of the damages to which petitioner undisputably is entitled because of its conceded negligence, regardless of the condition of the rear headlight, and regardless of the condition of the hand brake on the coal car, by reason of any contributory negligence on the part of petitioner?

The answers to these questions, which are self-evident and which respondent's briefs in this court make crystal clear, cry out to high heaven against the brazen, flaunting disregard by the Appellate and Supreme Courts of Illinois of the laws of the Congress and the Constitution of the United States, the laws and Constitution of the State of Illinois, and the clear, emphatic decisions of this Court.

On the question of petitioner's right to recover full damages for the violation by the railroad company of the provisions of the Federal Boiler Inspection Act, the respondent, while refraining from making a forthright admission that petitioner will be precluded on any new trial under the Appellate Court's opinion from recovering full damages for violation of the Federal Boiler Inspection Act, does not have the hardihood to contradict that proposition. Counsel indulges in the subterfuge that petitioner on a new trial may recover full damages by reason of the railroad company's violation of the Federal Safety Appliance Act because (Respondent's Brief in No. 125, p. 13) "Conceivably, he may introduce additional evidence that the brake was actually set 'with due care in the normal, natural and usual manner' "; and "That, contrary to what respondent's witnesses testified, the slope of the spur track was toward the main" and, therefore, the decisions of the Appellate Court is not final. This subterfuge is as illusory as it is insincere. It does not in any wise negative the proposition that petitioner has, by the Appellate Court's ruling, been denied the right to recover under the Federal Boiler Inspection Act.

As we have pointed out, there was no contest, and it was in effect admitted at the trial, that the brake on the coal car was inefficient, permitting it to drift from its safe position to its dangerous position (R. 56, ER. 8) and the evidence, admitted expressly without objection, which was withdrawn after it had been sustained by the trial court (R. 71, 73, ER. 23, 25), establishes the fact of the inefficiency of the brake on the coal car and its causal connection with petitioner's severe injuries.

Respondent's counsel in No. 125, apparently viewing the trial of a lawsuit as a game of ambush and ambuscade and with shocking insincerity and attempted deception, denies his admission that the brake on the coal car was defective.

Let us examine the record (R. 56, ER. 8):

> "Now I notice what Mr. Fuerst said about how the car got there. I don't know if it was put there, or whether it had drifted there.

"In other words, if the brakes were defective in holding the car. But I do know the car was too close to this track to clear a man riding on it. In other words, a man could get between there, but he would have to hunch in close * * *."

The record is devoid of any justification for the assertion in respondent's brief in No. 125, p. 6, that counsel made his opening statement to the jury before he had had an opportunity to interview his witnesses. It passes credulity that an experienced trial counsel of an eminent law firm representing a great railroad company did not interview his witnesses or learn the facts until he put them on the witness stand. Even if he were so negligent in preparing the defendant's case for trial, he nevertheless was the official spokesman for the defendant railroad company; and the court, the jury and opposing counsel were entitled to rely upon his statement in opening the case as to what were the issues that were to be tried. He never at any time, until after the jury had rendered its verdict, attempted to withdraw or sought to amend or correct that statement. On the contrary, he expressly withdrew objection after it had been sustained by the trial court (R. 73, ER. 25) to the question:

"Q. What would you say from the point that a brake was applied where you saw it applied when this car was in the clear to where the car was when you started to work with your engine and your body came in contact with that car whether that brake was efficient?

"Mr. Moir: I object to that if your Honor please.

"The Court: Objection sustained.

"Mr. Fuerst: May I respectfully——

"Mr. Moir: Just a minute, if your Honor please, I withdraw the objection. Proceed.

"The Court: All right.

"Mr. Moir: Have the question read.

(Question read)

"A. No, I would say it wasn't."

With respect to the statement in respondent's brief in No. 125, page 5, that "respondent vigorously contested any liability under the Safety Appliance Act at the trial," the lack of record references speaks eloquently of the falsity of this statement. On the contrary, the respondent railroad company did not offer any evidence whatsoever that the hand brake on the coal car was efficient. It did not call the brakeman who set the brake on the coal car when it was put in on the spur track as a witness. It did not call anybody who must have operated the brake after the accident to testify to its condition, and it is inconceivable that the coal car was left in its dangerous position after causing injury to one of respondent railroad company's employees. It did not call any car or brake inspector to testify to the condition of the hand brake. It did not produce any profile map showing the grade of the spur track, as it most certainly would have done if there were any honest question as to the direction of the grade of that track.

With respect to the present claim of respondent in No. 125 that the "only evidence as to the slope of the spur track was the testimony of three members of petitioner's crew that the spur track sloped 'away from the main track' and, therefore, 'the drift of the coal car toward the main track was impossible,' " the respondent railroad company in its reply in the Appellate Court of Illinois stated, on p. 7:

> "Reading the cold printed testimony of defendant's three witnesses, we concede that the words used by two of them (McKinney and Thomas) may be ambiguous as to whether the Clifford siding 'sloped' *up* or 'sloped' *down* from the O. P. Main. The testimony of Farr that the siding 'slopes *away from* the O. P. main' (Abst. 135) plainly connotes a downward slant away. McKinney said the track 'slopes to the West' (Abst. 124). This could mean either an uphill or downhill slant. Webster's New International Dictionary (2d ed.) gives as one of the definitions of the verb 'slope', 'to have a slant,' and as one of the definitions of the noun 'slope', 'up-

ward or downward slant or inclination.' Thomas said the Clifford siding has 'an incline to the West' (Abst. 138). In the same dictionary we find one of the meanings of 'incline', is 'ascent or descent'.

"If the only things we had to go by were those few words without the aid of Farr's testimony, we confess it might be embarrassing to tell which way the slant was."

The testimony of the fireman that the siding "sloped away from the O. P. main" literally and logically refers to horizontal distance and not to vertical direction. "An incline to the West" in ordinary lay language connotes a rise as the track proceeds in a westerly direction. "Slopes to the West" is meaningless as to whether it slopes up or down.

It is perfectly apparent from reading the record as a whole that there was no contest whatever with respect to the inefficiency of the brake of the hand car or the direction of the slope of the spur track. Respondent's claim in this respect is a pure afterthought conjured up on its combing the record after the trial and after the jury had rendered its verdict in an effort to secure a new trial.

There was no claim at the trial that the brake on the coal car was not inefficient or that the coal car did not drift from its safe to its dangerous position. With or without the admission of counsel in opening the case to the court and jury and the testimony to which we have referred, the photographs, Defendant's Exhibits 2 and 3, quite plainly reveal that the spur track, which is the one at the right of the photographs, rises as it comes into the foreground of the picture and away from the O. P. main. (R. 175-177).

The three defense witnesses, McKinney, Thomas and Farr, offered by the carrier respondent, as disclosed by the record, were so highly prejudiced and biased in favor of the respondent that their testimony can be likened unto potter's clay in the hands of respondent's counsel. Their own contradictions on the witness stand and likewise the

photographic exhibits clearly made their testimony in its entirety, unbelievable. If respondent's contentions had the basis of truth, can this Court conceive that with all the engineers in the employ of this carrier, not a single one was produced to testify with measurements or mathematical certainty regarding the pseudo condition of a grade claimed by the carrier for the first time, after the action was tried.

In the case of *Cusson* v. *Canadian Pacific Railway Company,* 115 Fed. 2d 430, the court held in a like situation that where a car was braked and then drifted from the position where it was braked, resulting in an accident and injury to the employee this was sufficient to raise a question of fact as to whether or not the brake on the car was efficient. There can be no question that the record in the case at bar discloses that the brake on the coal car that fouled the O. P. main track was inefficient and violated the Safety Appliance Act, with or without an admission that the brake was inefficient at the commencement of the trial.

The Illinois Appellate Court, therefore, deprived this petitioner both of his constitutional rights and the protection intended and provided for him under the Federal Safety Appliance Act.

ARGUMENT

THE MERITS

I.

Respondent's Contention That It Was Deprived of the Defense of Contributory Negligence is Wholly Untenable Even Though There Had Not Been Any Violation by the Respondent of Its Duty to Comply With the Federal Boiler Inspection and Federal Safety Appliance Acts.

The Illinois Courts flagrantly and erroneously violated both the Constitution and Laws of the United States by their refusal to conform to the federal decisional law on both the Federal Boiler Inspection and Federal Safety Appliance Acts; and by their arbitrary denial of petitioner's

indisputable rights thereunder, have opened a contention that under the Federal Employers' Liability Act the respondent may have been deprived of the defense of contributory negligence.

The carrier respondent under both the Federal Boiler Inspection Act and the Safety Appliance Act is deprived of the defense of contributory negligence when either or both of these acts are violated.

Let us therefore consider this false and baseless claim of contributory negligence defense, as is now claimed by the respondent.

The record discloses these facts:

Before midnight on November 14, 1946, petitioner, in the performance of his duties, was crushed and rolled for a distance of five to ten feet or more, in the narrow space of three to six to not more than ten inches wide between the side of a tender backing on a main track in respondent's dark and unlit yard. The side of a fouling car on a spur track was admittedly too close to the main track to provide safe and sufficient clearance.

Now, the respondent in face of this admitted testimony of entrapment seeks a brass ring on his legalistic carousel, idem est, another opportunity to have another jury pass upon the question of the amount of its admitted liability to this petitioner on the pretended premises that another jury might award a lesser sum on the alleged unfounded claim of contributory negligence. This imaginary claim can only be created on the theory that petitioner failed to see the dangerous position of the coal car during the night in an unlit yard before his accident. Likewise, it may be claimed that his failure to undertake to jump off the moving tender from the dangerous position created by the fouling of the main right of way by the coal car was negligence.

The respondent railroad company's negligence in permitting the fouling of its track by the coal car is admitted. The gross and almost criminal negligence of the engineer in failing to stop the movement which, according to his own

testimony, he could have done in one-third of the distance the engine traveled after he saw the dangerous position of the coal car was proven by his own testimony. (R. 194-8).

If, as the Appellate Court states, the jury was entitled to find that the rear headlight was out of focus, the negligence of the respondent railroad company in not repairing it is a definite issue of negligence, apart from any question of violation of the Boiler Inspection Act.

The general foreman of the respondent railroad company in charge of maintenance of locomotives testified that where there is a defect in the headlight, a new one could be put in, in approximately ten minutes; likewise, a defect in the reflector, it would take forty-five minutes to change it; and if there is a defect in the wiring of the socket of the bulb, it takes about thirty minutes to replace the socket. (R. 214-5).

Is it conceivable that under these circumstances of gross and multiple negligence that a jury can be found that would attribute negligence to this petitioner under these circumstances? The respondent's multiple negligence presents a case where the principle of de minimus should be applied. In fact, we believe that under the federal decisional law by this Court a motion to direct a jury against finding contributory negligence against petitioner would be properly sustained.

We therefore submit that any claim for reduction of damages on account of any negligence which might be attributable to petitioner is unreal and wholly lacking in substance and should not be the vehicle for further delay in requiring respondent railroad company to compensate your petitioner for serious injuries inflicted upon him by the respondent's admitted negligence, from which there is no escape except the flagrant, erroneous violation by the Illinois Courts of both the Constitution and the laws of the United States and by their refusal to conform to the federal decisional law announced by this Court.

JURISDICTION

I.

This Court Has Jurisdiction to Review the Orders of the Illinois Supreme Court in the Mandamus Action.

Unlimited jurisdiction in mandamus is conferred upon the Supreme Court of Illinois by the Constitution of that State which provides in Article VI, Par. 2, as follows:

> "The Supreme Court * * * shall have original jurisdiction in cases relating to the revenue, in *mandamus* and *habeas corpus*, and appellate jurisdiction in all other cases * * *"

The power, jurisdiction and authority of the Supreme Court of Illinois to issue a writ of mandamus is as broad and untrammelled as was the power, jurisdiction and authority of the King's Bench in England prior to the fourth year of the reign of James I. In discussing that question, the Illinois Supreme Court in *People ex rel German Ins. Co.* v. *Williams*, 145 Ill. 573 said:

> "The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of, the common law, prior to the fourth year of James I., (excepting certain statutes), and which are of a general nature, and not local to that kingdom, are by our statutes made the rule of decision until repealed by the legislature. Thereby the great body of the English common law became, as far as applicable, in force in this state."

One of the grounds upon which the Illinois Supreme Court entertains an original action for mandamus is that there is no other adequate remedy available to correct the wrong inflicted upon a litigant by an inferior court, and this jurisdiction is not confined to final orders, judgments and

decrees but may be exercised with respect to any interlocutory order which exceeds jurisdiction of the court. In the case at bar the Supreme Court of Illinois refused to follow its own pronouncement of the law germane to the writ of mandamus prayed for by your petitioner.

In *People ex rel Woll* v. *Graber*, 394 Ill. 362, the Illinois Supreme Court granted a writ of mandamus to expunge an interlocutory order of the Superior Court of Cook County involving federally created rights because the injured party could not appeal from the interlocutory order held to exceed the jurisdiction of the Superior Court, namely, an order requiring the United States Attorney for the Northern District of Illinois to withdraw his appearance for one of the defendants in an action to recover damages for alleged breach of contract. In that case the court said:

> "Neither the litigant, the attorney or the interest which the litigant or attorney represent, can appeal from such order. Nor is there any adequate remedy available to them other than the writ of mandamus from this Court.
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> "The general power of this Court to issue a writ of mandamus to an inferior court to expunge from its records an order, judgment or decree which is void because entered without jurisdiction is settled by a long line of decisions."

In *People ex rel Prince* v. *Graber*, 397 Ill. 522, the Supreme Court of Illinois granted mandamus to expunge orders requiring a non-resident plaintiff to appear in the City of Chicago for pre-trial deposition and staying the prosecution of the action until he did appear and submit to examination in an action against the Railway Express Company to recover damages for negligence of the express company while transporting certain dairy cattle. See also *People ex rel Kerner* v. *Keeney*, 399 Ill. 611.

In the case at bar the questions presented are matters of national concern involving federally created rights which

have been indefensibly violated by the judgment of the Appellate Court of Illinois. If, as respondents contend, the judgment of the Appellate Court is not subject to review and correction by the Supreme Court of Illinois under the archaic appellate practice in that state in any other way than by the exercise by the Illinois Supreme Court of its mandamus jurisdiction, we submit that the denial of that remedy constitutes an illegal usurpation of substantive rights and an unwarranted refusal to abide by the rule of essential uniformity which this Court has said must be applied in all courts, state and federal, in these railroad cases.

This Court has had occasion, in connection with this same section of the Illinois Constitution, to deprecate the ineffectiveness of practice and procedure in Illinois in *Marino* v. *Ragen*, 332 U. S. 561, in which the concurring opinion states:

> "The Illinois scheme affords a theoretical system of remedies. In my judgment it is hardly more than theoretical. Experience has shown beyond all doubt that, in any practical sense, the remedies available there are inadequate. Whether this is true because in fact no remedy exists, or because every remedy is so limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult, is beside the point."

Because of the mongrel decisions and denial of appellate relief in Illinois, as is apparent to this Court in *Marino* v. *Ragen*, supra, and other decisions by the Illinois Supreme Court, the several different procedures of appeal were instituted by your petitioner. By profound study and legalistic analysis, the Supreme Court of Illinois has in a sense pronounced that if a litigant chose one method and not one of the other methods, the litigant erred in selecting the wrong appellate procedure.

This can be likened only unto Aesop's Fable of the fox and the lamb; irrespective of the method or the excuse, the lamb was devoured. And likewise, was the result to the litigant here, because of the theoretical system of remedies in Illinois.

What constitutes a void order or judgment as distinguished from a judgment or order which is merely erroneous and correctable only on appeal, or by writ of error, has been stated by the Supreme Court of Illinois in *Armstrong* v. *Obucino*, 300 Ill. 140, as follows:

> "The statement has very frequently been made that where a court has jurisdiction of the parties and subject matter, its decree, however erroneous, can only be attacked on appeal or error; but the rule is subject to an exception equally well settled,—that a decree may be void because the court has exceeded its jurisdiction. • • • Courts are limited in the extent and character of their judgments, and if they transcend their lawful powers their judgments and decrees are void and may be collaterally impeached wherever rights claimed under them are brought in question. The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment or decree, however, erroneous, cannot be collaterally assailed, is only correct when the court proceeds according to the established modes governing the class to which the case belongs and does not transcend in the extent and character of its judgment or decree the law or statute which is applicable to it."

In *People ex rel Modern Woodmen of America* v. *The Circuit Court of Washington County*, 347 Ill. 34, it was held that jurisdiction of a court in a particular case includes not alone the power to hear the cause but likewise involves the power to render the particular judgment entered, and every act of the court beyond that power is void. See also *People ex rel Mike Maglori* v. *Joseph Siman*, 284 Ill. 28;